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THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1997 TERM

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C.W. SMITH, SMITH'S LAKE CORPORATION and

GRADY SMITH, Petitioners,

vs.

GWINNETT COUNTY, GEORGIA, Respondent.

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On Petition for Writ of Certiorari to the

Supreme Court of Georgia

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HOPP

QUESTIONS PRESENTED FOR REVIEW

(1) Whether the trial court's Order for Contempt, Injunctive, and Other Equitable Relief resulted in a taking of the Petitioners' property for public use which requires just compensation pursuant to the Takings Clause of the Fifth Amendment made applicable to the States by the Fourteenth Amendment to the United States Constitution?

(2) Whether the trial court's Order for Contempt, Injunctive, and Other Equitable Relief authorizing the trial court to take control of the Petitioners' property and Respondent to repair the dam and restore the lake and buffers at the Petitioners' expense was a valid exercise of police powers and substantially advanced a legitimate state interest as required by Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) and the Fifth and Fourteenth Amendments to the United States Constitution?

(3) Whether the trial court's Order for Contempt, Injunctive, and Other Equitable Relief authorizing the trial court to take control of the Petitioners' property and Respondent to repair the dam and restore the lake and buffers at the Petitioners' expense pursuant to the court's equitable powers requires just compensation under the Takings Clause of the Fifth Amendment made applicable to the States by the Fourteenth Amendment to the United States Constitution because this government action results in a taking of the Petitioners' property for public use?

LISTING OF ALL PARTIES

Petitioner SMITH'S LAKE CORPORATION has no parent companies and no subsidiaries.

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BASIS FOR JURISDICTION

The trial court's Order on Contempt, Injunctive, and Other Equitable Relief entered on October 15, 1996 was affirmed in Docket Number S97A0388 in the Georgia Supreme Court on June 2, 1997. Smith et al. v. Gwinnett County, 268 Ga. 179, __ S.E.2d __ (1997). The Georgia Supreme Court denied the Petitioners' Motion for Reconsideration on July 11, 1997.

The United States Supreme Court has jurisdiction in the instant Petition for Writ of Certiorari because Petitioner raises compelling issues dealing with the taking of their real property for public use without just compensation in violation of the Fifth and the Fourteenth Amendments to the United States Constitution and the Supreme Court of Georgia has decided important questions of federal constitutional law in a way that conflicts with the decisions of the United States Supreme Court.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

A. UNITES STATES CONSTITUTION

FIFTH AMENDMENT: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, not shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT; Section 1: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of

the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. GEORGIA STATUTES

O.C.G.A. 23-1-7 Equity to Do Complete Justice:

Equity seeks always to do complete justice. Hence, having the parties before the court rightfully, it will proceed to give full relief to all parties in reference to the subject matter of the action, provided the court has jurisdiction for that purpose.

O.C.G.A. 23-4-37 Enforcement by Execution or Attachment:

Every decree or order of a superior court in equitable proceedings may be enforced by attachment against the person for contempt. Decrees for money may be enforced by

execution against the property. If a decree is partly for money and partly for the performance of a duty, the former may be enforced by execution and the latter by attachment or other process.

C. GWINNETT COUNTY ORDINANCES

1. "The Development Regulations of Gwinnett County, Georgia," adopted January 5, 1988, Article 2, Definitions, Section 2.2 Definitions of Words and Phrases:

Clearing - The removal of trees or other vegetation, but not including grubbing activities.

Development - 1. (Verb) All activities associated with the conversion of land or the expansion or replacement of an existing use to any new use intended for human operation, occupancy or habitation, other than for agricultural purposes devoted strictly to the cultivation of the land, dairying or animal husbandry. Such activities include land disturbance (clearing and grubbing the land of vegetation and stumps, and grading) and the construction of improvements such as but

not limited to streets, driveways or parking areas, water or sewer mains, storm water drainage facilities, sidewalks or other structures permanently placed on or in the property. 2. (Noun) Where appropriate to the context, the term "development" also may be used to denote a specific subdivision or project which is a single entity or intended to be constructed as in interrelated whole, whether simultaneously or in phases.

Development Permit - An official authorization issued by the Department permitting clearing, grubbing, grading, or construction of storm drainage facilities, access drives, streets, parking or other improvements exclusive of buildings.

Grading - The movement, removal or addition of earth on a site by the use of mechanical equipment.

Grading Permit - An official authorization issued by the Department permitting grading of a site, and may include installation of attendant storm water drainage facilities.

Grubbing - The removal of stumps or roots from a property.

Land Disturbance Permit - Any permit other than a building permit issued by Gwinnett County that authorizes clearing or grading activities on a site or portion of a site. Said permit may be a Clearing, Clearing and Grubbing, a Grading, or Development Permit as defined and authorized herein.

Article 4 Permits Required for Development or Construction

Section 4.1.1: Permit Required; Exemptions

No disturbance of the land, including clearing, grubbing, or grading activities, shall commence or proceed except in accordance with the provisions of these Development Regulations, unless the activity is exempt as an agricultural activity in the RA-200 zoning district, or is for the construction of an individual single-family detached or duplex residence on a buildable lot of record.

Section 4.2. Land Disturbance Permits

4.2.1 Clearing Permit, Clearing and Grubbing Permit, and Grading Permit.

Section 4.2.2 Development Permit

a. Development Activities Authorized

A Development Permit shall be issued to authorize all activities associated with the land development process, including clearing and grubbing, grading, and the construction of such improvements as streets, surface parking areas and drives, sewer systems, storm water drainage facilities, sidewalks, or other structures permanently placed on or in the property except for buildings or other structures requiring the issuance of a building permit. Water system improvements shall be authorized solely by the Public Utilities Department.

2. "The 1985 Zoning Resolution of Gwinnett County, Georgia," as revised December 1994:

Article III Definitions:

Buffer. Land area used to visibly separate one use from another through screening and distance; to shield or block noise, light, glare, or visual or other conditions; to block

physical passage to non-similar areas; or to reduce air pollution, dust, dirt, and litter.

Section 606 Buffer Between Dissimilar Districts:

Section 606.1 A buffer shall be required for the following:

1. All property zoned for commercial, neighborhood shopping, office institutional, office business parks or industrial uses shall have a buffer along any rear and side property lines abutting a residential district.

STATEMENT OF THE CASE

A. THE FREEMAN LAKE PROPERTY: Petitioners C.W. Smith and Grady Smith are brothers. C.W. Smith owns all of the stock in Petitioner Smith's Lake Corporation. In April 1995, Smith's Lake Corporation acquired a fee simple interest in a seventy acre parcel of land located in Gwinnett County, Georgia. The dominant feature of this property is a fifty acre lake known as Freeman Lake (the entire property will be referred to as the "Freeman Lake Property"). In April 1995, there was an existing dam on the Freeman Lake Property. Beaver Ruin Creek flows into Freeman Lake.

The Freeman Lake Property is zoned C-2 commercial, general business. The property adjacent to the Freeman Lake Property is residential. The Freeman Lake Property is bordered on one side by a residential subdivision and Plantation Lane and bordered on the opposite side by a residential subdivision and Arcadia Drive. The Zoning Resolution of Gwinnett County requires a seventy-five foot

natural buffer area to be maintained on commercial property when it is adjacent to property zoned residential. Respondent contends that the dam only extends along a portion of the property, on the Plantation Lane side of Freeman Lake.

Freeman Lake has been designated as a flood way by the Federal Emergency Management Agency (FEMA). It is a designated wetlands area regulated by the Army Corps of Engineers (ACOE). The Georgia Department of Natural Resources has periodically inspected the dam but has declined jurisdiction over it.

B. DAM REPAIRS: The Petitioners have some prior knowledge of dams. After acquiring the Freeman Lake Property, the Petitioners undertook to repair the existing dam. In order to accomplish this, the Petitioners breached the dam, drained Freeman Lake and hauled in numerous loads of dirt and other fill material to use to repair the dam. Water needed to be drained from Freeman Lake to facilitate the repairs. The Petitioners dug trenches in the bottom of

Freeman Lake and began a clean up of the lake bottom and elsewhere by removing stumps and trees and debris.

In April, 1995, Gwinnett County advised Petitioners that there is no County Regulation which would prevent the draining of Freeman Lake. Respondent also advised that if Petitioners planned to do any type of construction on the Freeman Lake Property, permits must be obtained from Gwinnett County, FEMA, and ACOE.

C. LITIGATION: Petitioners continued to repair the dam without a County permit. Respondent initiated litigation seeking equitable relief in the Superior Court of Gwinnett County in Civil Action Number 95-A-5000. In addition, the County issued numerous citations against the Petitioners for violations of regulations, but Petitioners were subsequently acquitted of some and some were not prosecuted.

(1) T.R.O.: Gwinnett County filed a petition for injunctive relief and obtained a Temporary Restraining Order on August 2, 1995. (Appendix). The Temporary Restraining

Order provided that Petitioners are restrained and enjoined for a period of thirty (30) days or until further order of the court, whichever is sooner, from engaging in any construction activity, including grading, excavating, repairing the dam, cutting, destroying or otherwise harming any of the trees or vegetation located on the Freeman Lake Property and breaching or repairing the dam or allowing water from Beaver Ruin Creek from entering Freeman Lake. The court scheduled a hearing for the request for an Interlocutory Injunction.

(2) INTERLOCUTORY INJUNCTION: At the hearing on the Interlocutory Injunction, Respondent raised concerns about the Petitioners' activities in repairing the dam. Respondent's concerns were that these repairs were being conducted without Petitioners first having obtained a Land Disturbance Permit from the County, that the repairs were commenced with no engineering study to ensure that the dam was safely constructed, and that Petitioners were destroying

the required seventy-five foot natural buffer areas between the commercial Freeman Lake Property and the adjoining residential subdivisions. Respondent raised concerns about possible flooding over Plantation Lane that may result if Petitioners improperly constructed the emergency spill way and catch basin or improperly repaired the dam. Respondent was also interested in whether the Petitioners intended to commercially develop the Freeman Lake Property. The County expressed its desire to have Freeman Lake remain intact. (8/31/95 T.).

The Petitioners indicated that there were no plans to commercially develop the property and the repair activities did not involve a new use for the Freeman Lake Property. The Petitioners argued that they were not required to obtain a Land Disturbance Permit in order to repair an existing dam because there was no "development" or "new use" as defined in the County regulations. The Petitioners argued that an engineering study was not necessary because of the limited

nature of their intended repairs. The Petitioners' intention was to repair the dam to make it safe and to restore Freeman Lake to its original condition. The County had been satisfied with the dam as it existed prior to the Petitioners acquiring the Freeman Lake Property and that it complied with all applicable regulations. Petitioners acknowledged that as owners, they would be responsible and liable for any damages caused by an unsafe dam. In short, Petitioners argued that, as owners of the Freeman Lake Property, they had the right to undertake to repair the existing dam located on their property and to restore their lake, and that Gwinnett County could inspect the repairs when completed and take appropriate action if the dam was not safe. (8/31/95 T.).

The trial court converted the Temporary Restraining Order into an Interlocutory Injunction on September 11, 1995. (Appendix). The court found that the Respondent has certain responsibilities to all Gwinnett County residents to maintain the health, safety, and welfare of its citizens. The

trial court restrained and enjoined Petitioners from engaging in any construction activity, including grading, excavating, repairing the dam, cutting, destroying or otherwise harming any of the trees or vegetation located on the Freeman Lake Property and breaching or repairing the dam until such time as Petitioners receive a Land Disturbance Permit from Gwinnett County. The order provided that, without court intervention, the Petitioners could obtain written approval from the County to conduct activities in contravention of the order if the County determined this was in the County's best interests.

(3) CONSENT ORDER: Respondent subsequently filed a Motion to Compel Discovery and a Motion for Contempt which came before the trial court for a hearing in March 1996. The Motion to Compel dealt with the issue of the Smiths' failure to attend scheduled depositions and the Motion for Contempt dealt with the Petitioners' activities in repairing the dam. On the day of the hearing, Petitioner and

Gwinnett County reached an agreement that resolved all issues involved in the two motions and the parties announced this settlement to the court.

The trial court entered a Consent Order on March 25, 1996. (Appendix). The Consent Order provided that the Petitioners shall, within two weeks, retain a licensed engineer who is knowledgeable in the field of dam reconstruction, and that this engineer shall, within thirty days of being retained by Petitioners, render a written report concerning the safe reconstruction of the dam on the Freeman Lake Property. The parties agreed on six parameters to be encompassed in this engineering study. The Consent Order further provided that the Petitioners, within thirty days of the issuance of their engineer's report, shall commence the repair of the dam so as to accomplish the restoration of Freeman Lake in accordance with regulations promulgated by the ACOE, the FEMA, and the engineer's report. The Consent Order authorized the County's chief engineer to "monitor" all construction activity

concerning the repair of the Freeman Lake Dam. The Consent Order did not require Petitioners to obtain a Land Disturbance Permit from the County to repair the dam.

(4) ORDER FOR CONTEMPT, INJUNCTIVE, AND OTHER EQUITABLE RELIEF: Subsequent to the March 1996 hearing date, Respondent filed a Motion for Contempt raising the Petitioners' alleged failure to retain the engineer and to have his report issued and to commence the repairs within the timetable set forth in the Consent Order. A hearing was held on July 18, 1996, and after hearing evidence relating to the delays, the court continued the hearing for thirty days and it would evaluate the progress at that time.

Another evidentiary hearing on the contempt issue was eventually held on October 4, 1996. However, before this hearing, Respondent amended its motion. Respondent alleged at this hearing that Petitioners were clearing trees, grading and excavating on the Arcadia Drive side and elsewhere on the Freeman Lake Property without a Land

Disturbance Permit. Respondent further alleged that this activity destroyed the required natural zoning buffer area. Respondent alleged that this activity was unrelated to the repair of the dam that was located on the Plantation Lane side of the Freeman Lake Property and was in violation of the Interlocutory Injunction. Respondent also raised the issue that the Petitioners ruptured a sewer line and would not allow County workers to repair it. Respondent alleged that the Freeman Lake Property was a nuisance. (10/4/96 T.).

Petitioners argued that they were not required to obtain a County Land Disturbance Permit to repair the dam pursuant to the Consent Order and that the challenged clearing of trees, grading and excavating activities were undertaken solely to repair the dam as they were required to do pursuant to the Consent Order. Petitioners removed the dirt from this area because there was no other place on the Freeman Lake Property where the dirt could be removed. Petitioners argued that the County's engineer was ordered to

only monitor the construction and he had no authority to control the actual repair activities. The Petitioners argued that the Consent Order resolved all issues between the parties and superseded the Interlocutory Injunction. (10/4/96 T.).

Respondent's chief engineer had reviewed the Petitioners' engineering study and he had expressed no dissatisfaction with the study directly to the Petitioners or their engineer. Respondent did not contend that the Petitioners had failed to comply with the requirements of the engineering study. Respondent did not provide Petitioners with specifications or requirements in order to finish the repair of the dam to the County's satisfaction other than reference to County "development regulations". The County had no requirement that the repair of an existing dam must comply with specific developmental regulations. The County's chief engineer admitted that, because the repairs were nearing completion, the dam was in a safer condition than it was in March 1996. (10/4/96 T.).

The trial court entered an Order for Contempt, Injunctive, and Other Equitable Relief on October 15, 1996. (Appendix). The court held that the Interlocutory Injunction continued in full force and effect and was not superseded by the Consent Order. The court found that the Consent Order authorized Petitioners to repair the dam without the necessity of obtaining a Land Disturbance Permit.

However, the trial court found that the Petitioners willfully violated the Interlocutory Injunction by knocking down trees, grading and excavating on the Freeman Lake Property without first obtaining the required County Land Disturbance Permit and that these activities were unrelated to the repair of the dam and this occurred in an area where the dam, as defined by the Respondent, did not extend. The trial court found that the Petitioners violated the required seventy-five foot natural buffer area adjacent to the residential areas by removing the trees. The court also found that the Petitioners were in contempt because they did not allow

County employees access to the Freeman Lake Property and because Petitioners ignored the recommendations and suggestions of the County's chief engineer who had been monitoring the construction activities. The trial court held the Petitioners in contempt and the Smiths were each ordered to pay a $500.00 fine and incarcerated for twenty days.

The trial court's order went far beyond a finding of contempt. The trial court took control over the Freeman Lake Property pursuant to its equitable powers. O.C.G.A. 23-1-7. The court ordered that the County would now control the repair of the dam and its employees could enter the Freeman Lake Property without fear of trespass to restore the buffers and to restore Freeman Lake to its condition and dimension prior to the Smiths' breach of the dam. The court designated an investigator with the County district attorneys office as a monitor to oversee the repair of the dam and the restoration of Freeman Lake and the buffers. The court ordered that the repairs and restoration was to be completed

within ninety days, but an extension could be obtained for good cause.

The court further ordered that the County was to recover from Petitioners all reasonable costs incurred in completing the repair of the dam and restoring the lake and buffers, and if necessary, to recover all costs incurred to bring this project to completion in compliance with applicable local, state, and federal regulations and requirements. The court also awarded reasonable attorneys fees to Respondents in bringing the contempt action and would consider attorneys fees for future services relating to the repairs and restoration. The court authorized that the County could attach the Freeman Lake Property for the costs associated with the repair of the dam and the restoration of the lake and buffers. O.C.G.A. 23-4-37.

The trial court concluded that, as a matter of law, Gwinnett County's efforts in repairing the dam and restoring Freeman Lake and the buffers do not constitute a taking of

the Freeman Lake Property but "merely constitute an exercise of the County's police powers to protect the health, safety, and welfare of County residents."

Since the time of the October 1996 contempt hearing, the trial court has authorized the expenditure of substantial sums for the County to repair the dam and restore Freeman Lake and the buffer areas. For example, the trial court authorized the County to proceed with the removal of downed trees and woody debris at a cost not to exceed $75,373.25 , and to backfill ditches in the lakebed, and to complete the stabilization of buffer areas at an additional cost not to exceed $197,060.00. (Appendix). Expenditures could reach an estimated total of approximately $500,000.00.

(5) PRESERVATION OF ISSUES: Petitioners raised the issue of a taking in the trial court which was specifically addressed in the Order for Contempt, Injunctive, and Other Equitable Relief and the trial court found that there was no taking. (Order p. 8). Petitioners appealed to the

Georgia Supreme Court from the trial court's Order for Contempt, Injunctive, and Other Equitable Relief and raised the taking issue. The Georgia Supreme Court addressed this issue and held that there was no inverse condemnation or taking and the trial court acted within its equitable powers in taking control of the Freeman Lake Property and assessing costs against it. Smith at al. v. Gwinnett County, supra, 268 Ga. at 181.

ARGUMENT

The Georgia Supreme Court erred in affirming the trial court's finding that the October 1996 Order for Contempt, Injunctive and Other Equitable Relief did not result in an inverse condemnation and a taking which requires just compensation to the Petitioners. This Court should reverse the Georgia Supreme Court and remand to the trial court for a hearing consistent with the Takings Clause cases decided by this Court and cited herein.

A. The Takings Clause of the Fifth Amendment to the

United States Constitution, made applicable to the States through the Fourteenth Amendment, Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226, 239, 17 S.Ct. 581, 585, 41 L.Ed. 979 (1897), provides, "nor shall private property be taken for public use, without just compensation." The Takings Clause guarantee of the Fifth Amendment is designed to bar the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. Armstrong v. United States, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960). This Court has frequently observed that this issue depends largely upon the particular circumstances in each case. United States v. Central Eureka Mining Co., 357 U.S. 155, 168, 78 S.Ct. 1097, 1104, 2 L.Ed.2d 1228 (1958).

Seventy-five years ago, Justice Holmes first observed that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415, 43

S.Ct. 158, 160, 67 L.Ed. 72 (1922). Petitioners' case is an example where the government regulation of property has gone "too far."

This Court has not developed any set formula for determining when government regulation has gone "too far" and justice and fairness require a finding that a taking has occurred and the economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. See Goldblatt v. Hempstead, 369 U.S. 590, 594, 82 S.Ct. 987, 990, 8 L.Ed.2d 130 (1962). However, in engaging in these essentially ad hoc, factual inquiries in each case, this Court has identified several factors that have particular significance; (i) the economic impact of the regulation on the claimant; (ii) the particular extent to which the regulation has interfered with the claimant's distinct investment-backed expectations; and (iii) the character of the government action. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124, 98

S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978). In Agins v. City of Tiburon, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), this Court also required that the governmental regulation under scrutiny must substantially advance a legitimate state interest. See also Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987). In Dolan v. City of Tigard, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), this Court considered the nexus or degree of connection between the challenged government regulation and the legitimate state interest sought to be achieved. This Court required a "reasonable relationship" or more specifically, a "rough proportionality," and held that a taking would result from such regulatory action if, after an individualized determination, the regulation is not related both in nature and extent to the legitimate state interest sought to be achieved.

Despite this general case by case approach, the Court has consistently identified at least two categories of

regulatory action as compensable without case specific inquiry into the public interest advanced in support of the restraint. The first category encompasses regulations that compel the property owner to suffer a physical invasion of his property. In general, at least with regard to permanent invasions, no matter how minute the intrusion and no matter how weighty the public purpose behind it, there is a taking and compensation is required. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). This Court considers a physical intrusion by the government to be a property restriction of an unusually serious character for purposes of the Takings Clause, and in such cases, the character of the government action is the determinative factor. When faced with a permanent physical occupation of real property, as opposed to a temporary invasion, this Court has invariably found a taking, without regard to whether the governmental action achieves an important public benefit or has only minimal

economic impact on the owner.

The second situation in which this Court has found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. See Agins v. Tiburon, 447 U.S. at 260, 100 S.Ct. 2141; See also Nollan v. California Coastal Commission, 483 U.S. 825, 834, 107 S.Ct. 3141, 3147, 97 L.Ed.2d 677 (1987). The notion that a valid exercise of the police power is ipso facto not a taking requiring compensation was rejected by this Court in Nollan if the regulation denies all economic or productive use of the land.

In Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), while conceding that in previous cases no compensable injury had been found when the regulation under scrutiny was designed to prevent "harmful or noxious uses," this Court suggested that this analysis was simply the progenitor of the Court's more contemporary statements that land use regulation does

not effect a taking if it substantially advances legitimate state interests. The Court emphasized that the regulation deprived the landowner of all economically beneficial uses of the property, and in Lucas, this Court also noted that regulations that leave the owner without economically beneficial or productive options for the land's use, typically by requiring the land to be left substantially in its natural state, carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm. 505 U.S. at 1018, 112 S.Ct. at 2895.

These decisions emphasize that this Court will now carefully scrutinize the exercise of the police power and if the regulatory action precludes all economically beneficial use of the property or results in a permanent physical occupation, the fact that the regulation substantially advances a legitimate state interest is not enough to deprive a landowner of just compensation. If the use is not "nuisance-like" then the landowner is entitled to just compensation for the property

effectively acquired and taken by the governmental authority.

B. Applying these factors to the facts of this case demonstrates that the Freeman Lake Property was "taken" for public use from the Petitioners within the meaning of the Takings Clause of the Fifth Amendment and there must be just compensation. This Court has found that the Fifth Amendment is violated when land use regulation does not substantially advance legitimate state interests, when it results in a permanent physical occupation of the property, or when the challenged regulation denies an owner all economically viable use of his land. All of these considerations are present in the Petitioners' case.

The Georgia Supreme Court's decision attempts to justify the extreme actions taken by Gwinnett County as a valid exercise of police powers to protect the health, safety, and welfare of the citizens the County. The court found that the trial court's giving the County control over the Freeman Lake Property, the repairs to the dam and the restoration of

the lake and buffers and imposing all costs on Petitioners was not a taking but an exercise of the court's equitable powers. However, the basis for the trial court's order was not an unsafe dam caused by Petitioners' repair activities or the dangers resulting therefrom. The October 4, 1996 contempt hearing did not involve allegations by Respondent that the repairs to the dam were not moving toward completion, were not in accordance with the engineering study, or that the dam was in a less safe condition than before. There was no evidence of a nuisance resulting from an unsafe dam, an emergency, or any imminent danger to the public's health, welfare or safety.

Rather, the October 1996 hearing and the finding of contempt only involved issues of grading of land and clearing of trees in areas away from the dam and with the destruction of zoning buffer areas between commercial property and residential property. These are not matters which justify the extreme action taken by the trial court in taking control of the

entire Freeman Lake Property from the Petitioners and authorizing the Respondent to control the repair of the dam and restoration of the Freeman Lake, to the exclusion of the Petitioners, and to assess costs against the Petitioners' property under equitable powers. The Petitioners' alleged violations of buffer areas did not create a nuisance or any immediate danger to the health, safety and welfare of the citizens living near the Freeman Lake Property. This government regulation of Petitioner's property does not substantially advance the state's interests of ensuring safe dams, preventing flooding, or abating nuisances. This action is an impermissible use of the County police powers and is an impermissible exercise of the court's equitable powers which resulted in a taking of Petitioners' property for public use.

The court order authorizing Gwinnett County to complete the repairs to the dam and restoration of Freeman Lake results in the government placing a permanent and fixed structure, the dam, on the Freeman Lake Property. Implicit

in the court order is the conclusion that when these court imposed repairs to the dam and restoration of Freeman Lake are completed by Gwinnett County, the Petitioners may not change or remove it. As a result, the Freeman Lake Property will hereinafter consist of Freeman Lake and the structured dam as constructed by Gwinnett County pursuant to the court order. Petitioners have been excluded from control over the repairs to the dam on their property. This results in a permanent physical occupation of the Petitioners' Freeman Lake Property by the government in the form of a court-ordered government built dam.

This also forces the Petitioners to forego any potential development opportunities on the Freeman Lake Property because they are now required to maintain the lake and government built dam on their commercial property. The Petitioners have been denied all economically viable uses of the property. The Petitioners are now required to maintain the Freeman Lake Property substantially in its natural state,

that being a large lake. The Petitioners' investment-backed expectations have been defeated. This governmental action had a severely detrimental economic impact on Petitioners. Adding to the detrimental economic impact upon Petitioners is the substantial lien that will be placed on the property by Gwinnett County for the costs of the repairs to the dam.

C. There was a taking of Petitioners' Freeman Lake Property for public use when the court took control over the entire Freeman Lake Property, authorized County employees access to the Property, gave the County control of the completion of the repairs to the dam and restoration of Freeman Lake to the exclusion of the Petitioners, and authorized the County to assess all costs against Petitioners' property. This was a taking of the Petitioners' Freeman Lake Property.

An owner's "bundle" of property rights are the rights to "possess, use and dispose of it." United States v. General Motors Corp., 323 U.S. 373, 378, 65 S.Ct. 357, 359, 89

L.Ed.2d 311 (1945). Petitioners lost the right to possess and use their property and they have been totally excluded from the opportunity to influence and control the repair and restoration activities on their land. Furthermore, the right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property. Dolan v. City of Tigard, supra. Petitioners have been excluded from their own property rather than having the right to exclude others. Petitioners' ability to dispose of the property was seriously abridged, not only by the requirement that the dam be maintained as constructed by the County, but because when the court-ordered repairs and restoration is completed by the County, there will be a substantial lien on the property for these costs, and Petitioners will be unable to dispose of it until these assessments are fully paid and satisfied.

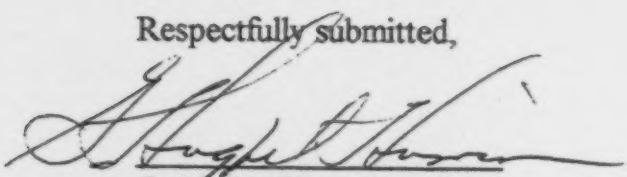
D. Gwinnett County's actions show a clear intent to require the Petitioners to maintain a lake and dam on the Freeman Lake Property. While the County claims that it has

no desire to acquire the Freeman Lake Property, the County has intended from the outset to preserve Freeman Lake for the benefit of the public. Gwinnett County has accomplished this end through the use of development regulations, police powers, and the contempt powers of the court. If Gwinnett County wishes to take Petitioners' property so that the aesthetic and other benefits from Freeman Lake flow to its citizens, the Constitution requires that the County must pay Petitioners just compensation. The Fifth and Fourteenth Amendments do not permit the County to impose this public burden on Petitioners alone rather than the public as a whole.

This case can be summed up by quoting language from this Court's opinion in Nollan v. California Coastal Commission, supra, that the County's actions were not a valid regulation of land use but an "out-an-out plan of extortion." 483 U.S. at 837, 107 S.Ct. at 3149. This Petition for Writ of Certiorari should be granted.

(Signature page follows).

Respectfully submitted,



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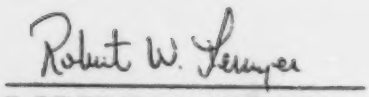

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DOCKET NO. OFFICE OF THE CLERK

THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1997 TERM

* * * * * * * * * * * * * * * *

C.W. SMITH, SMITH'S LAKE CORPORATION and

GRADY SMITH, Petitioners,

vs.

GWINNETT COUNTY, GEORGIA, Respondent.

* * * * * * * * * * * * * * * *

On Petition for Writ of Certiorari to the

Supreme Court of Georgia

* * * * * * * * * * * * * * * *

APPENDIX

* * * * * * * * * * * * * * * *

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In the Supreme Court of Georgia

Decided: June 2, 1997

S97A0388: Smith et al. v. Gwinnett County, Georgia

THOMPSON, Justice.

Gwinnett County brought suit against C.W. Smith, Grady Smith, and Smith's Lake Corporation, to enjoin defendants from engaging in any construction activity on property known as Freeman Lake. Following a hearing, the trial court issued a preliminary injunction, enjoining defendants from "grading, excavating, repairing the dam, cutting, destroying, or otherwise harming any of the trees or vegetation located on the [Freeman Lake] property ... until such time as the defendants receive a land disturbance permit from Gwinnett County."

One month later, the County moved to have defendants held in civil and criminal contempt of the preliminary injunction, asserting that they "have continued to

dump dirt, concrete, and debris in order to raise the grade of certain portions of the [Freeman Lake] property" and to commercially develop the property in violation of the "letter and spirit" of the preliminary injunction. The county also moved to compel discovery, alleging that both C.W. Smith and Grady Smith failed to attend their scheduled depositions. Before these matters were heard, the parties entered into a consent order, which reads, in part, as follows:

> [T]he parties having reached a settlement with regard to all issues involved in the motion to compel and motion for contempt, the parties having announced such settlement to the court, it is hereby ordered that the defendants shall retain a licensed engineer knowledgeable in the field of dam reconstruction within two weeks of the date of entry of this order. The defendants will direct the engineer ... to render a report concerning the safe reconstruction of the Freeman Lake Dam in accordance with engineering

standards ... [and to set forth] his or her instructions for the safe repair of the dam within thirty (30) days of being retained by the defendants. It is further ordered that within thirty (30) days of the engineer's issuance of such report, the defendants shall commence the repair of the Freeman Lake Dam so as to accomplish the restoration of Freeman Lake ..."

Weeks later, the County moved to have defendants held in contempt of the consent order, alleging that they failed to repair the dam and restore the lake. The County added that the lake constituted a nuisance and posed health risks to neighbors. Before the matter was heard, the County amended its motion, asserting defendants should also be held in contempt of the preliminary injunction because they cleared, graded and excavated a portion of the property "which is completely unrelated to the repair of the Freeman lake dam."

Evidence presented at the hearing demonstrated that

defendants graded the land and cleared the trees in a buffer area apart from the dam without obtaining a land disturbance permit. It also demonstrated that, when confronted with their conduct, defendants took the position that they could do what they wanted to do with their property.

The trial court found defendants in criminal contempt of the preliminary injunction and ordered C.W. Smith and Grady Smith to be incarcerated for twenty days and to each pay a $500 fine. In addition, the trial court took control of the Freeman Lake property pursuant to its equitable powers. In this regard, the trial court directed the County to restore the lake to its original condition, repair the dam and buffers, and "assess any and all reasonable costs ... against the defendants." Defendants appeal.

1. In their first enumeration of error, defendants assert the trial court erred in finding them in criminal contempt of the preliminary injunction. In this regard, defendants posit that the preliminary injunction was

superseded by the consent order and that, therefore, it was no longer in effect. We disagree.

The preliminary injunction enjoined defendants from repairing the dam, as well as from commercially developing the Freeman Lake property. Although a fair reading of the consent order demonstrates that the parties settled their differences concerning the motion to compel and motion for contempt, and that defendants were no longer enjoined from repairing the dam, it cannot be read as permitting defendants to resume the commercial development of the property. On the contrary, the consent order makes it clear that defendants' obligation to restore the lake remained in force. To say that, by virtue of the consent order, defendants were no longer enjoined from destroying the surrounding property defies the plain language of the consent order and common sense. "It is the spirit more than the letter of the injunction to which obedience is required." Patten v. Miller, 190 Ga. 123, 159 (8 S.E.2d 757)(1940). Besides, defendants were bound to obey

the preliminary injunction at their peril. They could not rely on their own interpretation of the consent order. If they were in doubt as to what they could or could not do without violating the preliminary injunction, they should have sought a modification or construction of its terms. General Teamsters Local Union No. 528 v. Allied Foods, Inc., 228 Ga. 479, 481 (186 S.E.2d 527)(1971); Warner v. Martin, 124 Ga. 387, 391(2)(52 S.E. 446)(1905).

The evidence authorized the trial court to find defendants guilty of criminal contempt beyond a reasonable doubt. In re Crane, 253 Ga. 667, 669(2)(324 S.E.2d 443)(1985).

2. The injunction does not give rise to an inverse condemnation of the Freeman Lake property. The trial court merely took control of the property to repair the dam and restore the lake. It did not work a destruction of defendants' private property without just and adequate compensation. Compare Lamar Advertising of South Georgia, Inc. v. City of

Albany, 260 Ga. 46, 47(389 S.E.2d 216)(1990).

3. The trial court did not exceed its powers in ordering the County to repair the dam and restore the lake at defendants' expense. "Where equity acquires jurisdiction for any purpose it will retain jurisdiction to give full and complete relief, whether legal or equitable, as to all purposes related to the subject matter." Fuller v. Dillon, 220 Ga. 36(1f)(136 S.E.2d 733)(1964); O.C.G.A. 23-1-7.

Judgment affirmed. All the Justices concur.

SUPREME COURT OF GEORGIA

Case No. S97A0388 Atlanta, July 11, 1997

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

C.W. Smith et al. v. Gwinnett County, Georgia

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Sherie M. Welch, Clerk

FILED OCTOBER 15, 1996

IN THE SUPERIOR COURT

FOR THE COUNTY OF GWINNETT

STATE OF GEORGIA

CIVIL ACTION FILE NO. 95-A-5000-3

GWINNETT COUNTY, GEORGIA, Plaintiff,

vs.

C.W. SMITH, SMITH'S LAKE CORPORATION, and

GRADY SMITH, Defendants.

ORDER FOR CONTEMPT, INJUNCTIVE,

AND OTHER EQUITABLE RELIEF

Gwinnett County's Motion for Contempt having come on regularly before this Court on Friday, October 4, 1996 at 1:30p.m., and the parties having presented evidence and argument with regard to all issues involved in the Motion for Contempt, this Court hereby finds as follows:

FINDINGS OF FACT

This Court finds that Judge Winegarden's

Interlocutory Injunction entered on September 11, 1995 continues in full force and effect.

This Court finds that the Freeman Lake dam extends from the intersection of Beaver Ruin Road and Plantation lane along Plantation Lane to an area adjacent to Tax Parcel 6-175-28 shown on Plaintiff's Exhibit 1, which fronts on Plantation Lane.

This Court further finds that the Consent Order entered by Judge Winegarden on March 22, 1996 authorized the repair of the dam without the necessity of the issuance of a Land Disturbance Permit.

This Court further finds that since Judge Winegarden's hearing of July 18, 1996, C.W. Smith, Grady Smith, and Smith's Lake Corporation have engaged in conduct in violation of the Interlocutory Injunction by knocking down trees, grading, and excavating, without first obtaining a Land Disturbance Permit from Gwinnett County. These activities have occurred in an area away from, and

completely unrelated to, the dam. This Court further finds C.W. Smith and Grady Smith have personally knocked down trees, graded, and excavated within the 75-foot buffer on the property adjacent to the residential areas along Arcadia Drive and Park Lake Subdivision.

This Court further finds that defendants have intentionally ruptured a sewer connection from the Presswood property on Arcadia Drive across the Freeman Lake property to an existing sewer main, and the Defendants have also prohibited County crews from coming upon the Freeman Lake property to repair the ruptured line. This Court finds that the Smiths' refusal to allow the County to repair the line resulted in the Presswood property remaining without a sewer hookup until a Temporary Restraining Order was issued by this Court on the morning of October 4, 1996.

This Court further finds that the Smiths have also prohibited other County employees from coming upon the Freeman lake property to determine whether violations of

County ordinances have occurred. This Court further finds that the Defendants have ignored the suggestions and recommendations of David Chastant, the County's chief engineer in charge of monitoring the dam during the construction process. This Court further finds that the Smiths have repeatedly been asked by the County to stop knocking down trees, clearing, and grading, but the Smiths have failed to do so.

This Court further finds that Gwinnett County has issued daily citations to the Smiths in an effort to stop the Smiths from violating the provisions of this Court's previous Orders as well as County ordinances, but the Smiths have ignored the citations and have continued to clear and grade in violation of this Court's Order. This Court further finds that the Smiths' activities on the subject property away from the dam would have required a Land Disturbance Permit from Gwinnett County prior to initiating such activities. This Court finds that the Smiths failed to obtain such a permit and

also failed to seek the Court's direction with regard to clearing and grading before the activity commenced.

This Court finds that the Smiths' joint and concerted actions constitute repeated willful violations of this Court's Order of September 11, 1995.

CONCLUSIONS OF LAW

Based upon the Smiths' conduct in violation of this Court's Order of September 11, 1995, this Court finds the Defendants C.W. Smith, Grady Smith, and Smith's lake Corporation in civil and criminal contempt of Court beyond a reasonable doubt. See O.C.G.A. 15-1-4 (a) (3). The Court notes that C.W. Smith specifically testified on cross-examination that even if he had to go to jail, he could not be stopped from removing trees on the subject property. Trans. P. 114. This Court finds such conduct to be in direct violation of the September 1995 Injunction. This Court further finds that the County has no adequate remedy at law and that a fine, in and of itself, would be insufficient to obtain

compliance with this Court's Order. The Court orders that the Defendants C.W. Smith and Grady Smith be incarcerated for 20 days each and pay a fine of $500 each.

IT IS HEREBY ORDERED that employees of Gwinnett County may enter upon the subject property without fear of trespass to repair the dam; to restore the 75-foot buffer adjacent to residential areas; to restore the lake to its condition and dimension prior to the Smiths' breach of the dam; and to protect the health, safety, and welfare of Gwinnett County citizens in accordance with applicable orders of local, state, and federal regulatory agencies. This Court hereby appoints James Burton as the Court ordered Monitor and orders that Gwinnett County shall submit to the Court and James Burton a written proposal regarding the details, including costs, of the repair of the dam and the restoration of the lake and buffers within a reasonable time, a copy of which will be furnished to Defendants' counsel, Mr. Hughel Harrison, for review and objections, if any. The

repair of the dam and the restoration of the lake and the buffers shall occur within 90 days. If the County finds an extension of time necessary, the Court will approve such extension for good cause shown.

This Court further orders that Gwinnett County shall assess any and all reasonable costs in completing the repair of the dam and restoration of the lake and the buffers against the Defendants. These costs will be personally assessed against the Defendant Corporation and each Defendant individually. If necessary, Gwinnett County shall be entitled to reimbursement for any and all reasonable costs incurred in bringing the repair of the dam and restoration of the lake and the buffers to a successful completion in compliance with applicable local, state, and federal regulations and requirements. This Court orders the County to obtain three telephone quotations and contract with the lowest responsive bidder for each aspect of the repairs in question. The Court notes that in utilizing its equitable powers, the Court has the

authority to attach the property for any costs in connection with repairing the dam and restoring the buffers and the lake, as well as for all costs in connection with any related restoration that is reasonable and necessary pursuant to this order. If necessary, Gwinnett County shall have the right to attach the property for all costs associated with the repair of the dam and the restoration of the lake and the buffers as provided in this Order upon application to the Court and a Court Order concerning the same. See O.C.G.A. 23-4-37.

Pursuant to is equitable powers, this Court also takes control of the entire Freeman Lake property as described on Exhibit "A" attached to the Interlocutory Injunction of September 11, 1995. The Court further orders that there will be no further disturbance of the subject property of any kind or in any way whatsoever unless approved by James Burton. James Burton shall be authorized to go on or about the property at any time as an officer of the Court to examine the circumstances and provide notice to the Court of any

infringements of these Orders. This Court further orders that the Defendants' existing equipment on the property shall not be used for construction, excavation, or otherwise absent the express written approval of James Burton. The Court further notes that if a permit is required for any land disturbing activity, such permit must be obtained prior to the commencement of such activity.

This Court cautions the Defendants that if this Court's Orders are again violated, there will be additional contempt sanctions as well as criminal charges, if appropriate. The Court cautions the Defendants that obstruction of police officers will be deemed an obstruction of justice, and if such activity occurs, criminal warrants will be obtained.

The Court further awards the County reasonable attorney's fees incurred in connection with this contempt proceeding in an amount to be determined in a future hearing. The Court will consider in the future any reasonable attorney's fees incurred in connection with the repair of the

dam and the restoration of the lake and the buffers that the Court has ordered herein.

The Court notes that Defendants' counsel has filed a Notice of Appeal, and the Notice of Appeal shall act as a supersedeas with regard to the portion of this Court's Order dealing with criminal contempt, that is, the incarceration of the Defendants for 20 days and the two $500 fines. See O.C.G.A. 5-6-13. The remaining equitable portions of this Order, however, are not governed by the supersedeas of the Notice of Appeal; the County may begin the repair of the dam and restoration of the lake and the buffers during the pendency of the appellate process, if any. See O.C.G.A. 9-11-62(c); Howard v. Smith, 226 Ga. 850, 852 (1970). This Court concludes as a matter of law that the County's efforts in repairing the dam and restoring the lake and the buffers do not constitute a taking of the subject property but merely constitute an exercise of the County's police powers to protect the health, safety, and welfare of County residents.

Finally, this Court orders that all matters of record, including professional reports, shall be available to those persons and/or companies hired to repair the dam and restore the lake and the buffers so as to facilitate such repair and restoration in the most economical manner.

SO ORDERED this the 14th day of October, 1996 nunc pro tunc to October 4, 1996.

K. Dawson Jackson, Judge

Gwinnett Superior Court

FILED MARCH 25, 1996

IN THE SUPERIOR COURT

FOR THE COUNTY OF GWINNETT

STATE OF GEORGIA

CIVIL ACTION FILE NO. 95-A-5000-5

GWINNETT COUNTY, GEORGIA, Plaintiff,

vs.

C.W. SMITH, SMITH'S LAKE CORPORATION, and

GRADY SMITH, Defendants.

CONSENT ORDER

The above-styled action having come on regularly before this Court on March 15, 1996 at 2:00 p.m. for a hearing concerning Gwinnett County's Motions to Compel Discovery and for Contempt, and the parties having presented evidence and argument, and the parties having reached a settlement with regard to all issues involved in the Motion to Compel and Motion for Contempt, and the parties having announced such settlement to the Court,

IT IS HEREBY ORDERED that the Defendants shall retain a licensed engineer knowledgeable in the field of dam reconstruction within two weeks of the date of entry of this Order. The Defendants will direct the engineer of their choice to render a report concerning the safe reconstruction of the Freeman Lake Dam in accordance with engineering standards.

IT IS FURTHER ORDERED that the Defendants shall require the engineer of their choice to issue a written report concerning his or her instructions for the safe repair of the dam within thirty (30) days of being retained by the Defendants.

IT IS FURTHER ORDERED that within thirty (30) days of the engineer's issuance of such report, the Defendants shall commence the repair of the Freeman lake Dam so as to accomplish the restoration of Freeman Lake in accordance with regulations promulgated by the United States Army Corps of Engineers, the Federal Emergency Management

Agency, and their Engineer's report.

In the event that the engineer chosen by the Defendants determines that the debris dumped on the Freeman lake property, which debris is the subject of the County's Motion for Contempt, may be utilized in the reconstruction of the dam, it is hereby ordered that the Defendants may utilize such debris in the construction of the dam. In the event that the engineer chosen by the Defendants determines that the debris may not be utilized in the repair of the dam, however, it is hereby ordered that the Defendants shall remove all such debris from the subject property within ten (10) days of the issuance of the engineers report.

IT IS FURTHER ORDERED that the report furnished by the engineer chosen by the Defendants shall address the issues outlined by the County on Exhibit "A" which is attached hereto and by this reference made a part hereof.

IT IS FURTHER ORDERED that Gwinnett County's

Chief Engineer, David Chastant, shall be permitted to monitor all construction activity concerning the repair of the Freeman Lake Dam.

SO ORDERED, this the 22nd day of March, 1996.

RICHARD T. WINEGARDEN, JUDGE

GWINNETT SUPERIOR COURT

Order prepared by:

M.. Van Stephens, II

Attorney for Plaintiff

Order consented to:

G. Hughel Harrison

Attorney for Defendants

EXHIBIT "A"

The following is a summary of the parameters of the Engineering Study referenced in this Order:

1. Design of a concrete spillway

2. Design of the dimensions and placement of a pipe and catch basin

3. Compaction of the soil and other materials placed in the dam

4. Designation of the type of materials to be used to repair the dam

5. Designation of the use of rip rap for wave protection and slope protection on the dam

6. Completion of a Backwater Analysis and No Rise Study

FILED SEPTEMBER 11, 1995

IN THE SUPERIOR COURT

FOR THE COUNTY OF GWINNETT

STATE OF GEORGIA

CIVIL ACTION FILE NO. 95-A-5000-5

GWINNETT COUNTY, GEORGIA, Plaintiff,

vs.

C.W. SMITH, SMITH'S LAKE CORPORATION, and

GRADY SMITH, Defendants.

INTERLOCUTORY INJUNCTION

The above styled action having come on regularly before this Court on August 28, 1995 at 2:00 p.m., and the case having been continued until August 31, 1995 at 9:00 a.m., and counsel for all parties to this action having presented argument and evidence with regard to Gwinnett County's request for an Interlocutory Injunction,

IT IS HEREBY ORDERED that the Temporary Restraining Order issued on August 1, 1995 by Homer M.

Stark is hereby converted to an Interlocutory Injunction. This Court finds that the County has certain responsibilities to all County residents to maintain the health, safety, and welfare of the citizens of this County. It is hereby ordered that the Defendants Grady Smith, C.W. Smith, and Smith's Lake Corporation are restrained and enjoined from engaging in any construction activity, including grading, excavating, repairing the dam, cutting, destroying, or otherwise harming any of the trees or vegetation located on the real property described on Exhibit "A" and breaching or repairing the dam located on the subject property until such time as the Defendants receive a Land Disturbance Permit from Gwinnett County. The Defendants may, however, obtain written approval from Gwinnett County to conduct activities in contravention of this order in the event that Gwinnett County determines such actions to be within the County's best interests.

It is further ordered that the Defendants may erect a fence on the subject property so long as the fence meets all

requirements of local, state, and federal law.

SO ORDERED this the 8th day of September, 1995.

Richard T. Winegarden

Judge, Superior Court

Gwinnett County, Georgia

Order prepared by:

M. Van Stephens, II

Attorney for Plaintiff

FILED AUGUST 2, 1995

IN THE SUPERIOR COURT

FOR THE COUNTY OF GWINNETT

STATE OF GEORGIA

CIVIL ACTION FILE NO. 95-A-5000-5

GWINNETT COUNTY, GEORGIA, Plaintiff,

vs.

C.W. SMITH, SMITH'S LAKE CORPORATION, and

GRADY SMITH, Defendants.

TEMPORARY RESTRAINING ORDER

Plaintiff's Verified Petition for Temporary Restraining Order and supporting Affidavit having been read and considered, and the Court having examined the Certificate of Plaintiff's attorney concerning the notice given to the Defendants and the Court having determined that Defendants could reasonably be expected to have knowledge that the activity sought to be restrained is improper and that this action might occur,

IT IS HEREBY ORDERED that Defendants GRADY W. SMITH, C.W. SMITH, and SMITH'S LAKE CORPORATION are restrained and enjoined for a period of thirty (30) days from the date hereof or until further order of this Court, whichever is sooner, from engaging in any construction activity, including grading, excavating, repairing the dam, cutting, destroying or otherwise harming any of the trees or vegetation located on the real property described on Exhibit "A" and breaching or repairing the dam located on the subject property or allowing water from Beaver Ruin Creek from entering the lake - H.S..

IT IS FURTHER ORDERED that a hearing before this Court on the request for interlocutory injunction pending a final resolution of this action is hereby set for the 28th day of August, 1995 at 2:00 o'clock p.m.

SO ORDERED this 1st day of August, 1995 at 11:15 o'clock a.m.

Homer M. Stark

Chief Judge, Superior Court

Gwinnett County, Georgia

Order prepared by:

M.. Van Stephens, II

Gwinnett County Department of Law

EXHIBIT "A"

BK11224 PG0161

All that tract or parcel of land lying and being in Land Lots 174, 175, and 185, 6th District, Gwinnett County, Georgia and being more particularly described as follows:

BEGINNING at a point ... [legal description of property follows].

FILED JUNE 13, 1997

IN THE SUPERIOR COURT

FOR THE COUNTY OF GWINNETT

STATE OF GEORGIA

CIVIL ACTION FILE NO. 95-A-5000-3

GWINNETT COUNTY, GEORGIA, Plaintiff,

vs.

C.W. SMITH, SMITH'S LAKE CORPORATION, and

GRADY SMITH, Defendants.

ORDER

Gwinnett County's Motion to Proceed with the Removal of Downed Trees and Woody Debris, the Backfilling of Ditches, and the Stabilization of all Buffer Areas Disturbed at Freeman Lake having come on regularly for hearing on June 13th at 2:00P.M., and the parties having presented evidence and argument with regard to the same,

IT IS HEREBY ORDERED that Gwinnett County's Motion to Proceed with the Removal of Downed Trees and

Woody Debris, the Backfilling of Ditches, and the Stabilization of all Buffer Areas Disturbed at Freeman lake is hereby granted. This Court hereby authorizes Gwinnett County to contract with Gary's Grading and Pipeline Company, Inc. for the removal of downed trees and woody debris from the perimeter and interior of Freeman Lake at a cost not to exceed $75,373.25.

IT IS FURTHER ORDERED that Gwinnett County is authorized to contract with RSE Grading Company, Inc. for the backfilling of all ditches within the footprint of the lake and the stabilization of all buffer areas which were disturbed by the Smiths at Freeman lake for an amount not to exceed $197,060.00.

SO ORDERED this the 13th day of June, 1997.

K. Dawson Jackson, Judge

Gwinnett Superior Court

Order prepared by:

M. Van Stephens, II

Attorney for Plaintiff

Consented to as to form by:

G. Hughel Harrison

(3)

Supreme Court, U.S.
FILED
NOV 24 1997
CLERK

DOCKET NO. 97-709

THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1997 TERM

****

C. W. SMITH, SMITH'S LAKE CORPORATION and

GRADY SMITH, Petitioners,

vs.

GWINNETT COUNTY, GEORGIA, Respondent.

****

On Petition for Writ of Certiorari to the

Supreme Court of Georgia

****

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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DOCKET NO. 97-709

THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1997 TERM

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C. W. SMITH, SMITH'S LAKE CORPORATION and GRADY SMITH, Petitioners,

vs.

GWINNETT COUNTY, GEORGIA, Respondent.

****

On Petition for Writ of Certiorari to the Supreme Court of Georgia

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STATEMENT OF THE CASE

Although the Petitioners seek to fashion this case as one in which Gwinnett County has taken their property for public use without just compensation, the facts of the case do not support this allegation.

Gwinnett County has never indicated any interest in acquiring the subject property for any purpose. Instead, the Smiths have purchased a property which consists primarily of an existing lake and associated wetlands and have subsequently taken numerous actions to create commercial building pads on top of portions of the wetlands and lake bed. In doing so, the Smiths have breached the existing dam on the property and have created a flood hazard which threatens a community's sole access to their subdivision.

While the Smiths would have this Court believe that the Gwinnett Superior Court has taken their property away from them, the Court's Orders in this case clearly indicate otherwise. After the Smiths completely

ignored the discovery process, and in response to a Motion to Compel Discovery, the Smiths and the County entered into a Consent Agreement whereby the Smiths would repair the Freeman Lake Dam after obtaining direction from a licensed engineer. The Consent Order is important in that it indicates the Smiths' agreement that the repair of the Freeman Lake Dam and the restoration of the Freeman Lake are necessary prior to any further development activities on the property. The Consent Order is also important in that it evidences the County's willingness to allow the Smiths to correct the problem which they created by breaching the dam.

It was only when the Smiths completely disregarded the Consent Order that the

County filed a Motion for Contempt and sought Court intervention in the actual repairs of the dam. Even then, the County had no desire to be burdened with the repairs to the Freeman Lake Dam, and merely requested that the Court sanction the Smiths for failing to abide by their agreement as evidenced by the Consent Order. Many of the Smiths' actions during the pendency of the contempt proceeding, however, resulted in the Court's determination that the Smiths should not be permitted to continue construction activity on the dam. Instead, the Court ordered the County to repair the dam and restore the lake utilizing a bidding process and billing the Smiths for the cost.

While the Smiths have indicated to this Court that they were almost finished repairing the dam when the Court entered its Order, the facts of this case clearly indicate otherwise. Instead of repairing the dam, the Smiths began destroying large mature trees on the side of the property completely removed from the dam. These trees were within a required 75 foot buffer area, and once the trees were knocked down, they could not be replaced. While knocking down the trees, the Smiths took the position that the County's Zoning Resolution concerning such buffer areas did not apply to them. When the County repeatedly served citations upon the Smiths for violation of the buffer, the Smiths literally continued knocking down trees near the officers

serving the citations. The Smiths knocked down large trees within three feet of their property lines, and their actions as observed by the County's employees indicated that the Smiths believed that once the trees were knocked down, their purpose had been accomplished and County Ordinances could not defeat their development scheme.

Not only did the Smiths completely destroy large mature trees in the buffer area, the Smiths dug into the existing grade of the land to remove entire portions of the subject property to a depth of over eight feet. In doing so, the Smiths intentionally ruptured a nearby resident's sewer line leading from her home to the County's sewer main which traverses the Smiths' property. The Smiths openly

contended that although the sewer line had been in place for more than twenty years, the resident did not have the right to maintain a sewer line from her property to the County's sewer main. The Smiths refused to allow County employees to repair the ruptured sewer line or enter onto the Smiths' property during a time in which sewage was overflowing in the resident's home. It is interesting to note that the Smiths ruptured the resident's sewer line the night before the contempt hearing on this matter. The Smiths' actions indicated to the Superior Court Judge that the Smiths were willing to openly defy the Court's Order and would continue to develop the property as they saw fit until someone physically stopped them from doing so. In

fact, during the contempt hearing before the Superior Court the day after the sewer line was ruptured, Grady Smith told the Judge that the Judge could put him in jail, but the Judge could not stop him from knocking down trees on the subject property. During the contempt hearing, another witness testified that when he confronted the Smiths concerning their actions in knocking down trees within the buffer area, Grady Smith stated that he was a multimillionaire and could do whatever he wanted.

Not only did the Smiths completely obliterate the buffer required by County Zoning Ordinances, but the Smiths also destroyed large areas of wetlands surrounding the lake. The Smiths cleared over 800 trees in the area surrounding the

lake, and the Smiths dug trenches in the lakebed and wetlands area which had the effect of removing waters from the wetlands on a continuous basis and channeling it into a small area of the property. The Smiths' activities violated Federal law, and the United States Environmental Protection Agency, at the urging of the United States Army Corps of Engineers, issued an Order requiring the Smiths to cease and desist from their activities, to refill the trenches, and to restore the lake and wetlands areas prior to any further construction efforts. The Smiths completely ignored the Environmental Protection Agency's Order and continued to grade in the wetlands.

The facts of this case reveal property owners who were determined to develop their property in violation of local, state, and Federal regulations and in the face of almost daily citations. The Smiths took the position that they could develop their property as they wished, and they refused to cease development until physically forced to do so. Under such circumstances, the Superior Court's Order incarcerating the Smiths and preventing them from further construction activities on the subject property until the dam and lake were restored was an appropriate exercise of the Court's equitable powers.

Throughout the Smiths' Brief filed with this Court, the Smiths contend that the Superior Court's Order constitutes a permanent physical occupation of the property by the County which denies them of all economically beneficial or productive uses of their land. The facts of this case simply do not bear out these allegations. The Superior Court's Order is clear that the County's sole involvement with the subject property is the repair of the dam and restoration of the lake under close Court supervision. Once the repairs are completed, the Smiths will have the ability to further develop their property as they see fit so long as they comply with local, state, and Federal regulations concerning the development. There is simply no evidence of

any permanent physical occupation of the Smiths' property by the County.

With regard to the Smiths' allegation that the Court's Order denies them all economically beneficial or productive uses of their property, the County submits that the present zoning of the property provides evidence to the contrary. The property is zoned C-2 Commercial and presently has areas adjacent to intersections of Beaver Ruin Road and Plantation Lane, as well as Beaver Ruin Road and Arcadia Drive, where commercial development could have physically occurred prior to the Smiths' draining of the lake. The Smiths' actions after draining the lake evidence a plan to broaden the commercial pads in these areas so as to accommodate additional commercial development on the

land. The Smiths' actions were designed to decrease the size of the lake, drain portions of the surrounding wetlands, and allow access to the commercial pads from additional areas of the property. The Smiths have admitted that they brought in a tremendous amount of dirt from off-site areas. The dirt included busted and discarded concrete, boulders, and other debris. The Smiths used this material to create a flat building pad where a portion of the dam and its spillway once existed. The Smiths' actions to date in broadening the areas where commercial construction activity could occur refute their contention that the Court's Order deprives them of all economically beneficial uses of the land.

Since the property's zoning in the early 1970's, the County has recognized that the property can be put to commercial uses. As the Smiths do so, however, the County merely wishes to exercise its police power to insure that wetlands are not inappropriately destroyed, the flood plain is not encroached upon in violation of Federal law, and that the dam, which must be repaired prior to any commercial construction activity, be repaired in accordance with standard engineering principles. The safety of those who travel daily on the County roadway directly below the dam is the County's paramount concern in this matter. The Smiths' actions in constructing a dam which by all expert accounts to date in this case is inadequate

and unsafe mandates the Superior Court's action in overseeing the construction of a safe dam in the area.

ARGUMENT AND CITATION OF AUTHORITY

Pursuant to Rule 10, this Court does not review Writs of Certiorari as a matter of right but grants such petitions only for compelling reasons. Gwinnett County respectfully submits that the Smiths' Petition for Certiorari does not raise an important question of the type specified in Rule 10 but merely involves a property owner's attempt to develop his property without complying with local, state, and Federal development regulations. As such, the Smiths' Petition for Writ of Certiorari

is inappropriate, and Gwinnett County respectfully requests that this Court deny the Smiths' Petition.

The facts of this case indicate that the Gwinnett County Superior Court was merely dealing with a local development dispute which forced the Superior Court to resort to its equitable jurisdiction. The Superior Court's Order of October 15, 1996, which is set forth on page 10 of the Petitioner's Appendix, provides a concise statement of the facts which led the Court to exercise its equitable jurisdiction. Basically, the Smiths openly defied existing Court Orders, and their actions clearly indicated that if they were permitted to continue construction activities on the

property, damage to the public health, safety, and welfare would result. In light of this fact scenario, the Court exercised its equitable jurisdiction to authorize the County to repair a dam and restore a lake which had been in existence prior to the initiation of this controversy. The Superior Court noted that where equity acquires jurisdiction for any purpose it will retain jurisdiction to give full and complete relief, whether legal or equitable, as to all purposes related to the subject matter. Fuller v. Dillon, 220 Ga. 36 (1964). See also Official Code of Georgia Annotated § 23-1-7. The Trial Court took control of the property to repair the dam and restore the lake, and the Trial Court's action did not work in destruction of the

Defendants' private property without just and adequate compensation. Compare Lamar Advertising of South Georgia, Inc. v. City of Albany, 260 Ga. 46 (1990). When the repairs to the dam and the restoration of the lake occur, the Smiths' property will contain a lake which exists at an identical elevation to the lake which existed prior to this controversy. If the Smiths wish to drain the lake and develop the property in accordance with appropriate regulations, they will be permitted to do so.

This Court has previously recognized that a valid exercise of the police power is ipso facto not a taking requiring payment of compensation. Nollan v. California Coastal Commission, 483 U.S. 825 (107 SC 3141, 97 LE 2d 677) (1987). This Court has also

recognized that a governmental regulation must deny a property owner all economically viable uses of his property in order to require payment of just compensation. See Agins v. Tiburon, 447 U.S. 255 (100 SC 2138, 65 LE2d 106) (1980). In the case at bar, the Petitioners have utterly failed to prove that they have been denied all economically viable uses of their property. To the contrary, the subject property has been zoned for commercial purposes since the early 1970's, and all parties contemplate that the property may be further developed for commercial purposes at some point in the future. Presently, however, the Smiths have violated county, state, and Federal development regulations in attempting to expand the commercial building pads on the

property at the expense of Federally protected wetlands.

CONCLUSION

Gwinnett County respectfully submits that the Superior Court's Order finding the Smiths in contempt for failure to abide by a Consent Order requiring the repair of the Freeman Lake Dam and the restoration of Freeman Lake does not rise to the level of a controversy which merits this Court's consideration on a Petition for Writ of Certiorari. The Trial Court merely exercised its equitable powers to ensure that the existing structures on the subject property are properly repaired so as not to endanger the public health, safety, and

welfare due to a potential breach of the dam and associated flooding. The Superior Court has not limited the Smiths' ability to construct a commercial structure or structures of their choice on the property. The Smiths have recognized that the dam must be repaired and the lake restored prior to such development as evidenced by the Consent Order by the parties dated March 25, 1996 and incorporated in the Petitioners' Appendix at page 21.

WHEREFORE, Gwinnett County respectfully requests that the Smiths' Petition for Writ of Certiorari by denied.

(SIGNATURE PAGE FOLLOWS)

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